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No. 90-537

Supreme Court, U.S.
FILED
NOV 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL H. GULLEY, ET AL., PETITIONERS

v.

SUNBELT SAVINGS, FSB
(FEDERAL DEPOSIT INSURANCE CORPORATION,
RECEIVER)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a purchase and assumption transaction entered into by the Federal Savings and Loan Insurance Corporation as receiver for an insolvent savings and loan association is voidable under the Texas Uniform Fraudulent Transfer Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 902 F.2d 348. The opinion of the district court (Pet. App. 7a-12a) is reported at 714 F. Supp. 819.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1990. A petition for rehearing was denied on June 27, 1990. Pet. App. 13a. The petition for a

writ of certiorari was filed on September 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 19, 1988, the Federal Home Loan Bank Board (Bank Board) declared Sunbelt Savings Association insolvent. The Bank Board appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver and directed it to liquidate Sunbelt.[1] Pet. App. 2a. Federal regulations establish an order of priority for paying creditor claims against insolvent thrift institutions, and require the receiver to pay higher priority claims in full before paying any lower priority claims. 12 C.F.R. 569c.11(d) (1989).[2] The applicable regulations provided that if the failed association "was operated under the laws of a state that provided a priority for holders of withdrawable accounts over * * * other claims or general creditors, such priority * * * shall be observed by the receiver." 12 C.F.R. 569c.11(a)(6) (1989). Texas law provides that claims of depositors have priority over the claims of general unsecured creditors. Tex. Rev. Civ. Stat. Ann. art. 852a § 8.09(g)(2)-(4) (Vernon Supp. 1990).

The Bank Board determined that Sunbelt's assets were not sufficient to pay its depositors and secured

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[1] The Federal Deposit Insurance Corporation (FDIC) later assumed FSLIC's role as receiver for Sunbelt pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 401(a), (f), (h), 103 Stat. 354, 356, 357. Accordingly, the FDIC is the respondent in this action.

[2] The federal priority regulations have been transferred to 12 C.F.R. 389.11 (1990).

creditors in full. The consequence of this determination was that general unsecured creditors of Sunbelt, whose claims were subordinate to the claims of depositors and secured creditors under the applicable priority regulations, were not entitled to any assets of the receivership estate. The Bank Board authorized FSLIC, as receiver for Sunbelt, to enter into a purchase and assumption transaction with Sunbelt Savings, FSB (New Sunbelt), a newly chartered federal savings bank. Pursuant to a purchase and assumption agreement, FSLIC transferred substantially all the assets of Sunbelt Savings to New Sunbelt. In return, New Sunbelt agreed to assume Sunbelt's liabilities to depositors to the extent of their deposits, as well as Sunbelt's liabilities to secured creditors to the extent of the value of their collateral. New Sunbelt did not agree to assume liability on claims by Old Sunbelt's general unsecured creditors. Thus, FSLIC arranged through the purchase and assumption transaction for the bulk liquidation of most of Sunbelt's assets, and at the same time arranged for the satisfaction of all of Sunbelt's liabilities to depositors and secured creditors. Pet. App. 2a, 11a n.4.

2. Prior to the Bank Board's declaration that Sunbelt Savings was insolvent, petitioners defaulted on substantial loans from Sunbelt. They then filed an action against Sunbelt in state court asserting lender liability claims. Following its appointment as receiver, FSLIC removed petitioners' action to the United States District Court for the Northern District of Texas, where it remains pending. Petitioners subsequently filed a second action in state court seeking a declaratory judgment that the purchase and assumption transaction between the receiver and New

Sunbelt violated the Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code Ann. §§ 24.001-24.013 (Vernon 1987). The Bank Board and FSLIC intervened as defendants and removed the declaratory judgment action to federal court. Pet. App. 2a-3a, 8a.

3. The district court granted the respondents' motion for summary judgment in the declaratory judgment action. Pet. App. 7a-12a. The court held that application of the Texas Uniform Fraudulent Transfer Act was preempted by federal statutory provisions granting the Bank Board broad discretionary powers to regulate the savings and loan industry, and empowering FSLIC as receiver to choose the course of action that "it deems to be in the best interest of the association, its savers, and the Corporation." Pet. App. 10a (quoting 12 U.S.C. 1729(b)(1)(A)).

4. The court of appeals affirmed without reaching the preemption question, holding that petitioners were not entitled to relief under the Texas Uniform Fraudulent Transfer Act. Pet. App. 1a-6a. In order to obtain relief under that Act, the court noted, petitioners were required to show, at a minimum, (1) a right to payment out of the assets of the receivership estate; (2) that assets were transferred out of the estate; (3) that the transfer was fraudulent within the meaning of the statute; and (4) that avoidance of the transfer was necessary to satisfy their claims. Pet. App. 3a. Here, the court concluded, petitioners failed to make the required showing. The court observed that FSLIC is required by the federal priority regulations to pay depositors' claims in full before paying any general creditors' claims. The Bank Board determined that Sunbelt's assets were insufficient to pay depositors and secured creditors, and

consequently determined that the claims of unsecured creditors were worthless.[3] The court of appeals expressly stated that, even if this "worthlessness determination" is subject to challenge in a collateral proceeding such as this, petitioners had failed to challenge it in the district court and would not be permitted to do so on appeal. Pet. App. 5a n.4. The court of appeals concluded that the conditions for obtaining relief under the Texas Uniform Fraudulent Transfer Act had not been met. If petitioners are unsecured creditors, the Bank Board's worthlessness determination forecloses their right to payment out of the assets of the receivership estate. And if petitioners are secured creditors, avoidance of the acquisition agreement is unnecessary because petitioners can recover from New Sunbelt. Pet. App. 5a.

The court of appeals declined to consider petitioners' additional arguments "attacking the means by which FSLIC carried out its receivership responsibilities" and asserting "various constitutional violations," because petitioners had not raised them in the district court, and because they are irrelevant to the question whether the Texas Uniform Fraudulent Transfer Act requires avoidance of the transfer of assets to New Sunbelt. Pet. App. 6a.

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[3] Because Sunbelt was insolvent by nearly $2 billion, it was clear that upon liquidation there would be insufficient assets to pay claims of even the highest priority secured creditors, and that consequently unsecured creditors would receive nothing. See Pet. App. 11a n.4.

ARGUMENT

The decision of the court of appeals rests largely on its interpretation of Texas law. The decision is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 4-8) that the decision of the court of appeals deprives them of procedural due process and violates separation of powers principles. The short answer to these contentions is that they were not raised in the district court. Moreover, petitioners' constitutional claims focus on the Bank Board's worthlessness determination, a determination that petitioners failed to challenge in the district court.[4] Because petitioners failed to raise their constitutional arguments in the district court, and because they are not closely related to petitioners' claim under the Texas Uniform Fraudulent Transfer Act, the court of appeals properly declined to address them. See *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule * * * that a federal appellate court does not consider an issue not passed upon below."). Similarly, this Court generally declines to consider issues not raised in the courts below. See *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941). Accordingly, review of petitioners' constitutional contentions is not warranted.[5]

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[4] Although the question is not presented in this case, respondent's position is that petitioners could have sought judicial review of the Bank Board's worthlessness determination pursuant to the Administrative Procedure Act, see 5 U.S.C. 702-706, but not in a collateral proceeding such as this. See *Village South Joint Venture* v. *FDIC*, 733 F. Supp. 50 (N.D. Tex. 1990).

[5] There is no plausible argument that petitioners were subjected to a clear miscarriage of justice in this case. They do

2. Petitioners incorrectly contend (Pet. 8-9) that the decision of the court of appeals conflicts with this Court's decision in *Coit Independence Joint Venture* v. *FSLIC*, 109 S. Ct. 1361 (1989). In *Coit*, this Court held that the statutes governing FSLIC and the Bank Board do not confer on FSLIC authority to adjudicate the merits of creditors' claims against a failed savings and loan institution, and do not divest courts of jurisdiction to consider those claims *de novo*. *Id.* at 1368. In this case, neither the Bank Board nor FSLIC has attempted to adjudicate the merits of petitioners' claims (which remain pending in a separate action) or to divest the court of jurisdiction over those claims. Instead, the Bank Board determined that Sunbelt's assets were insufficient to satisfy any general creditors' claims. Petitioners assert that "[t]he Fifth Circuit effectively held that the FHLBB has adjudicatory power, because it held that the FHLBB's finding that general creditors' claims against Sunbelt are worthless is determinative of [petitioners'] claims." Pet. 10. But the worthlessness determination did not address the merits of petitioners' claims; that determination simply recognized that—whether or not the claims were meritorious—there were no assets in the receivership estate to pay them. Moreover, the court of appeals did not suggest that petitioners had no opportunity to obtain judicial review of the Bank Board's worthlessness determination. The court said only that it was bound by that determination because petitioners had failed to challenge it in the district court. Pet. App.

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not deny that Sunbelt Savings was "insolvent by nearly $2 billion," that its assets were not sufficient to pay its depositors, and that depositors' claims took priority over petitioners' claims. See Pet. App. 11a n.4.

5a. See note 4, *supra*. In short, there is no conflict with *Coit*.

3. Petitioners also assert (Pet. 10-11) that the Fifth Circuit's decision in this case conflicts with its decision in *Triland Holdings & Co.* v. *Sunbelt Service Corp.*, 884 F.2d 205 (1989). Intra-circuit conflicts generally do not warrant a grant of certiorari. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). And in any event, the court of appeals' decision in this case does not conflict with its decision in *Triland*. In *Triland*, the Fifth Circuit declined to dismiss the plaintiffs' claims as moot because of "the possibility that at some point [plaintiffs], if successful in their damages claims, will be able to collect." 884 F.2d at 208. The court considered FSLIC's contention "that there will *never* be any assets with which to satisfy a judgment," and said that "[i]f true, this contention would justify dismissal of these actions on prudential grounds." *Ibid.* Based on the record in *Triland*, however, the court was "unable to conclude that all potential forms of relief are permanently precluded." *Ibid.* In this case, in contrast, the court did not dismiss petitioners' claims on the merits, but held only that petitioners were not entitled to set aside the purchase and assumption transaction under the Texas Uniform Fraudulent Transfer Act. The record in this case fully justifies the court's holding, and its conclusion that the Bank Board's worthlessness determination forecloses petitioners' right to payment from the receivership estate.

4. Petitioners next assert (Pet. 11-12) that the courts below misapplied the priority regulations. Petitioners contend that the Texas priority statute applies only to liquidations, and assert that the purchase and assumption transaction was not a liquida-

tion. The resolution of this state law question hardly warrants further review by this Court. Moreover, the court of appeals correctly concluded that the purchase and assumption transaction was a form of bulk liquidation that expedited the distribution of assets to those entitled to receive them. Pet. App. 4a n.2. In the purchase and assumption transaction, FSLIC distributed substantially all the receivership assets to New Sunbelt, and in return obtained New Sunbelt's agreement to assume liability for the claims of depositors and secured creditors. Because the receivership assets were insufficient to satisfy the claims of depositors and secured creditors, the receiver did not pay any claims of unsecured creditors. The purchase and assumption arrangement was an efficient way to allocate assets among competing claimants with different priorities. As such, it was properly classified as a form of liquidation.

5. Finally, petitioners are incorrect in asserting (Pet. 12-13) that the decision of the court of appeals "nullifies" the Texas Uniform Fraudulent Transfer Act. Pet. 13. The court of appeals' held only that the requirements for obtaining relief under the Texas statute were not met in this case, not that the statute is a nullity. Contrary to petitioners contention (Pet. 12), the court of appeals did not say that petitioners are not "creditor[s]" within the meaning of the Texas statute. Rather, the court held that petitioners had no right to payment out of the assets of the receivership estate (if they are unsecured creditors), or that avoidance of the transfer was unnecessary to satisfy their claims (if they are secured creditors). Pet. App. 3a. In either case, the conditions for avoiding a transaction under the Texas Uniform Fraudulent Transfer Act were not satisfied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1990

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